IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 3 [illegible]

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; OREGON ELECTRIC RAILWAY COMPANY; OREGON TRUNK RAILWAY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY; CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY; and THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,

Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter called the Milwaukee, appeals from the judgment of the United States District Court for the Eastern District of Wisconsin dismissing the Milwaukee's complaint seeking to enjoin, annul and set aside an order of the Interstate Commerce Commission entered in its Docket No. 31466.

I. OPINION BELOW.

The decision of the United States District Court for the Eastern District of Wisconsin, pursuant to which the judgment here appealed from was entered, is reported at

Chicago, Milwaukee, St. Paul & P. R. Co. v. *United States,* 182 F. Supp. 81 (D.C.E.D. Wis., 1960).

It is appended hereto as Appendix A, at pages 1a-16a, hereof.

The report and order of the Interstate Commerce Commission, which appellant sought in the court below to enjoin, annul and set aside, is reported at

Chicago, M., St. P. & P. R. Co. v. *Spokane, P. & S. Ry. Co.,* 300 I.C.C. 453 (1957).

II. JURISDICTION.

The Milwaukee brought suit under 28 U.S.C., section 1336, to enjoin, annul and set aside the said order of the Interstate Commerce Commission. The proceedings in the court below were conducted pursuant to, and in accordance with, Title 28 U.S.C., sections 1398, 2284, 2321, 2322, 2323, 2324 and 2325, Title 49 U.S.C. 17(9), and the Administrative Procedure Act, Title 5 U.S.C.A. section 1009.

The judgment of the District Court was entered on March 25, 1960. The Milwaukee filed its notice of appeal in the United States District Court for the Eastern Dist-

rict of Wisconsin on April 12, 1960. On motion of the Clerk of the District Court an order was entered on May 26, 1960, extending the time to docket the case and file the record on appeal until August 10, 1960.

The jurisdiction of the Supreme Court of the United States to review this decision on direct appeal is conferred by Title 28, U.S.C., sections 1253 and 2101 (b). The following authorities sustain the jurisdiction of this Court to review the judgment of the lower court in this case:

Denver & R.G.W.R. Co. v. *Union P. R. Co.*, 351 U.S. 321, 76 S. Ct. 982, 100 L. ed. 1220 (1956);
Secretary of Agriculture v. *U.S.*, 350 U.S. 162, 76 S.Ct. 244, 100 L.ed. 173 (1956);
Thompson v. *United States*, 343 U.S. 549, 72 S. Ct. 978, 96 L.ed. 1134 (1952).

III. QUESTIONS PRESENTED.

1. Whether the District Court erred in holding that the Interstate Commerce Commission correctly concluded that the Spokane, Portland and Seattle System, hereinafter called S.P.&S. System, is operated in conjunction, and under common management and control, with the Great Northern Railway Company and the Northern Pacific Railway Company within the meaning of section 15(4) of the Interstate Commerce Act.

2. Whether, under section 15(4) of the Interstate Commerce Act, one railroad can be operated in conjunction, and under common management or control, with two independent, competing railroads, neither of which owns a controlling interest in the first or any interest whatever in the other.

3. Whether the District Court erred in holding that the Interstate Commerce Commission's finding that, with certain exceptions, through routes do not exist over the Milwaukee's line via Spokane between points on the S.P.&S. System, on the one hand, and points throughout the United States, on the other hand, notwithstanding: (a) complete interchange facilities exist between the Milwaukee and S.P.&S. system at Spokane; (b) through billing of cars is available and is utilized by shippers of hundreds of cars a year of various commodities over the Milwaukee's line between Spokane and Minneapolis-St. Paul; (c) joint export-import rates are in effect via such line on all commodities moving between S.P.&S. System port cities and all points on the Milwaukee and its connections east of the Missouri River; and (d) joint rates on lumber and forest products are also in effect from origins on the S.P.&S. System to nearly all points served by the Milwaukee between Spokane and Chicago, including all points on its line between Spokane and Minneapolis-St. Paul, is supported by substantial evidence and should not be disturbed.

4. Whether the District Court erred in holding that the Interstate Commerce Commission's finding that the failure and refusal of the S.P.&S. System to join in the establishment of through routes and joint rates with the Milwaukee and its connections via Spokane similar to those in effect between the S.P.&S. System and the Great Northern and Northern Pacific and their connections is not a violation of sections 1(4), 3(1) or 3(4) of the Interstate Commerce Act, is supported by substantial evidence and should not be disturbed.

5. Whether the District Court erred in holding that the finding by the Commission that it is not necessary

or desirable in the public interest, in order to provide adequate and more efficient or more economic transportation, to require the establishment of through routes and joint rates between the S.P.&S. System and the Milwaukee via Spokane similar to those in effect via the S.P.&S. System and the Great Northern and the Northern Pacific and their connections is supported by substantial evidence and should not be disturbed.

IV. STATUTES INVOLVED.

The questions raised on this appeal require consideration of the following provisions of the Interstate Commerce Act, as amended:

Section 1(3) (b), 49 U.S.C., Sec. 1(3) (b);
Section 1(4), 49 U.S.C., Sec. 1(4);
Section 3(1), 49 U.S.C., Sec. 3(1);
Section 3(4), 49 U.S.C., Sec. 3(4);
Section 13(1), 49 U.S.C., Sec. 13(1);
Section 15(1), 49 U.S.C., Sec. 15(1);
Section 15(3), 49 U.S.C., Sec. 15(3);
Section 15(4), 49 U.S.C., Sec. 15(4).

These statutes are set out in order as Appendix B, at pages 17a-22a hereof.

V. STATEMENT OF THE CASE.

A. Statement of Facts.

The Milwaukee is an interstate common carrier operating from Chicago through the Twin Cities, Minneapolis and St. Paul, to Spokane and Seattle. *Chicago, M., St. P. & P. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, at 454 (1957). Together with its connections it serves all points east and south of Minneapolis-St. Paul. The lines of the Great Northern and the Northern Pacific, collectively called the Northern Lines, extend also from Minneapolis-St. Paul to Spokane. The Milwaukee competes with each of them for traffic to and from the S.P.&S. System, and the Northern Lines also compete with each other for such traffic.

The S.P.&S. System operates approximately 950 miles of railroad in a generally westward direction from Spokane through the states of Washington and Oregon. *Ibid.*, at 461-462. Except for qualifying shares owned by S.P.&S. officers, the Northern Lines each own equal shares of all the stock and bonds of the S.P.&S. System, but, as found by the District Court, neither can alone control the S.P.&S. System. 182 F. Supp. 81, at 85.

At Spokane there are complete interchange facilities between the S.P.&S. System and the Milwaukee. *Chicago, M., St. P. & P. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, at 471 (1957). During 1952 these facilities were used to interchange 513 carloads of freight. *Ibid.*, at 473. The S.P.&S. System also connects at Spokane with the Northern Lines. *Ibid* at 461.

Through routes and joint rates for all commodities, both eastbound and westbound, are maintained by the S.P.&S. System with each of the Northern Lines via Spokane. *Ibid.*, at 499-501. The S.P.&S. System has refused, however, to join with the Milwaukee in a full line of joint rates for commodities between S.P.&S. System points and points on the Milwaukee and its connections, via the Milwaukee's line between Spokane and Minneapolis-St. Paul. *Ibid.*, at 479, 481. Joint rates via such line are in effect on export-import traffic between port cities at the westerly end of the S.P.&S. System and all points served by the Milwaukee and its connections east of the Missouri River. Also in effect on lumber and forest products are joint rates from all S.P.&S. System points to all points on the Milwaukee's line between Spokane and Minneapolis-St. Paul, as well as to most points beyond on the Milwaukee.

Most other traffic interchanged with the Milwaukee at Spokane must move at a combination of local rates which, because appreciably higher than the joint rates via the Northern Lines, penalizes a shipper's use of the Milwaukee's route. As a result, the Milwaukee is deprived of the haul via its line between Spokane and Minneapolis-St. Paul on thousands of cars per year with a resulting annual revenue loss of over 2 million dollars.

B. The Proceedings Before the Interstate Commerce Commission.

The Milwaukee filed its amended complaint under section 13(1) of the Interstate Commerce Act with the Interstate Commerce Commission on August 27, 1954, charging the S.P.&S. System with violations of sections 1(4), 3(1) and 3(4) of that Act by reason of its refusal to establish with the Milwaukee a complete line of joint rates on commodities originating at or destined to points on

the S.P.&S. System. The complaint requested the Interstate Commerce Commission to determine and prescribe just, reasonable, non-preferential, non-prejudicial, and non-discriminatory joint rates and, if necessary, through routes via Spokane for all commodities between points on the S.P.&S. System and points on the Milwaukee and its connections on a parity with those maintained via Spokane by the S.P.&S. System with the Northern Lines.

The S.P.&S. System admitted by answer that it had refused to enter into a full line of joint rates with the Milwaukee, but asserted that such joint rates would require the S.P.&S. System to embrace within the through routes, over which such rates would apply, substantially less than the length of its railroad and of the Northern Lines, contrary to section 15(4) of the Act.

The Northern Lines each filed a petition for leave to intervene on behalf of defendant S.P.&S. System, and each alleged that it and the S.P.&S. System are connecting railroads operated in conjunction and under a common management or control lying between the termini of said through routes. The Milwaukee denied the affirmative allegations in the answer of the S.P.&S. System and in the petitions of the Northern Lines to intervene, and placed them upon proof with respect thereto.

Petitions for leave to intervene on behalf of defendant S.P.&S. System also were filed by certain operating and non-operating labor organizations of the Northern Lines.

Interveners in support of the Milwaukee, all of whom appeared and took active part in the proceeding before the Commission were:

Secretary of Agriculture of the United States.
Western Forest Industries Association.

National Livestock Producers Association.
Chicago Producers Commission Association.
American National Cattlemen's Association.
National Wool Growers Association.
Traffic Bureau of Sioux Falls, South Dakota.

After extended hearings and briefs, the Examiner proposed that the Commission find that: (1), the S.P.&S. System is jointly managed and controlled by the Northern Lines within the meaning of section 15(4), and, therefore, the establishment of through routes is prohibited unless they are found to be necessary or desirable in the public interest and are needed to provide adequate, and more efficient or more economic, transportation; (2) with certain limited exceptions, no through routes exist on traffic interchanged between the S.P.&S. System and the Milwaukee at Spokane; (3) existing combination rates on lumber and forest products, fresh fruits and vegetables, and livestock from points on the S.P.&S. System to destinations east of Spokane, and on furniture, agricultural implements, grain, iron and steel grain bins, and hogs, from points east of Spokane to destinations on the S.P.&S. System,

> "are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Milwaukee routes and unduly preferential of shippers and receivers using the routes composed of the S.P.&S., and the northern lines, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the routes of the S.P.&S., and the northern lines, . . ."

and (4) it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes and joint rates thereover the

same as apply via the S.P.&S. System and each of the Northern Lines and their connections, be established via Spokane between the S.P.&S. System and the Milwaukee and its connections on the commodities and between the areas named in (3) above.

By report and order entered May 10, 1957, the Commission adopted the first two findings proposed by the examiner and rejected the last two, substituting its findings that (1) the failure and refusal of the S.P.&S. System to join in the establishment of such through routes and joint rates do not result in discrimination against the Milwaukee nor in undue preference or prejudice between shippers or localities; and (2) the evidence does not show it necessary or desirable in the public interest, in order to provide adequate and more efficient or more economic transportation, to require the establishment of the through routes and joint rates. The Commission dismissed the complaint and, by order dated October 24, 1957, denied a subsequent petition for reargument and reconsideration.

On review pursuant to Title 28 U.S.C., section 1336, the order of the Interstate Commerce Commission was affirmed. The lower court discussed at some length the question of common management and control, but simply held that the other findings of the Commission are supported by substantial evidence and should not be disturbed.

VI. THE QUESTIONS ARE SUBSTANTIAL.

1-2. Among the questions presented by this appeal is whether joint control by two independent competing railroads, co-owners of a third railroad, constitutes common management or control within the meaning of section 15 (4) of the Interstate Commerce Act. Inasmuch as each

of the Northern Lines has its own separate and independent management, no contention was or could be raised that the S.P.&S. System is under a common management with each of the Northern Lines.

The District Court found that neither the Great Northern nor the Northern Pacific can individually control the S.P.&S. System, 182 F. Supp. 81, 85. The question thus presented whether a railroad can, within the meaning of section 15(4), be under common control with each of two railroads, neither of which can claim a controlling interest, is one of first impression before the courts. The question can be answered only by determining the meaning of control intended by Congress:

> "We should rather apply the rule of interpretation laid down by the Supreme Court of West Virginia in *Coal & Coke Ry. Co.* v. *Conley, supra,* and in *Robinson* v. *Kistler,* 62 W.Va. 489, 59 S.E. 505, wherein it is declared that the word 'control' has no legal or technical meaning, and must be given such an interpretation as the Legislature intended it to have, to be ascertained from the connection in which it is used, the act in which it is found, and the legislation of which it forms a part." *Gulf Refining Co.* v. *Fox,* 11 F. Supp. 425, 430.

The Interstate Commerce Commission made no effort to determine Congressional intent. The District Court appears to have given little or no thought to the intent of the Congress which in 1910 first conferred protection from short hauling on carriers under common management or control.

The District Court did inquire into the thinking of the Congress which in 1940 enacted section 1(3) (b) of the Interstate Commerce Act. This section broadened the defi-

nition of control as used in specified sections of the Act other than section 15(4).

Unfortunately the District Court's opinion, 182 F. Supp. 81, 86, reveals a misapprehension by the Court that Congress, in enacting section 1(3) (b), had in mind only the question of single rather than joint control. The language of section 1(3) (b) demonstrates that Congress, in broadening the meaning of control in sections other than 15(4), had definitely in mind both single and joint control:

> ". . . where reference is made to control (in referring to a relationship between any person *or persons* and another person *or persons*), such reference shall be construed to include actual as well as legal control . . ." (emphasis supplied).

Congress in enacting section 1(3) (b) omitted reference to section 15(4) because it did not wish to broaden the interpretations of section 15(4) theretofore made. The District Court referred to numerous Commission cases to support a conclusion, not that the Commission had previously interpreted Section 15(4) to include joint control, but that the Commission would so interpret the phrase when such a case was presented to it. It is clear from the following comment of the joint Senate-House Conference Committee that Congress was indicating its approval of actual (not speculative) interpretations of section 15(4):

> "The definition of control was made to apply only in the specified sections because it was thought undesirable to make any change in the interpretation of present law in certain other provisions of the act, notably section 1(1) (a) and section 15(4)." (H. Rep. 2832. 76th Cong., 3d Sess.)

Only in two cases prior to 1940 had there been an interpretation of section 15(4) involving a claim of common

management or control by joint owners. These cases are *Absorption of Switching Charges of Alton & S. R.R.*, 157 I.C.C. 129 (1929), and *Manufacturers Ry. Co.* v. *Ahnapee & W. Ry. Co.*, 172 I.C.C. 554 (1931). As is true of the Northern Lines, none of the joint owners in the cited cases could individually control the subsidiary railroad, which was jointly controlled by a majority of the owners The Commission in each case decided that such control is not common control within the meaning of section 15(4) of the Act.

The District Court admittedly disregarded the only actual interpretations of section 15(4) with respect to joint control, approved by Congress when it enacted section 1(3) (b), 182 F. Supp. 81, 90.

3. Another substantial question raised is whether, under the undisputed facts of this case, through routes already exist over the Milwaukee's line between Spokane and Minneapolis-St. Paul, via which additional joint rates are herein sought. If such through routes do exist, the Commission erred in holding that its power to grant relief is circumscribed by the short haul restrictions of section 15(4), which imposes no limitation on the Commission's power to prescribe joint rates over existing through routes. *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562, 575.

The opinion of the District Court does not discuss the merits of the arguments of the Milwaukee and of the Secretary of Agriculture that through routes already exist. Instead the District Court merely states that there is substantial evidence to support the Commission's finding that through routes via which additional joint rates are sought do not presently exist.

A through route is but an arrangement, express or implied, for the continuous carriage of goods from the orig-

inating point on the line of one carrier to a destination on the line of another. *St. Louis S. W. Ry. Co.* v. *United States*, 245 U.S. 136, 139.

Joint rates are herein sought via the Milwaukee's line between Spokane and Minneapolis-St. Paul between S.P. &S. System points, on the one hand, and points on the Milwaukee and its connections both east and west of Minneapolis-St. Paul. Included among the commodities are lumber and forest products. Joint rates thereon are now in effect from all S.P.&S. System origins to all points on the Milwaukee's line between Spokane and the Twin Cities and to points beyond on the Milwaukee, to but not including Chicago. Joint rates also apply via the Milwaukee's lines east of Minneapolis-St. Paul on all commodities originating at or destined to S.P.&S. System points. It is thus clear that an arrangement presently exists between the S.P.&S. System for the interchange of lumber and forest products at Spokane, where complete interchange facilities are available, and for the continuous movement thereof over the entire segment of the Milwaukee's line between Spokane and Minneapolis-St. Paul and beyond. Joint rates, as a matter of law, presuppose through routes. *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I.C.C. 7, 17.

Also in effect today and for many years past are export-import rates applicable between various port cities located at the west end of the S.P.&S. System and all points on the Milwaukee and its connections east of the Missouri River. These rates all apply via the Milwaukee's line between Spokane and Minneapolis-St. Paul and beyond on any commodity which can be transported by railroad. Thus there are already established not only through routes on lumber and forest products over the Milwaukee's line between Spokane and Minneapolis-St. Paul but through routes on every commodity.

The fact that present combination rates on lumber and forest products to certain destinations and on other domestic traffic to and from S.P.&S. System points are an obstacle to movement via the Milwaukee's line between Spokane and Minneapolis-St. Paul in no way negatives the existence of through routes. *Virginian Ry.* v. *United States,* 272 U.S. 658, 661-667; *Great Northern Ry. Co.* v. *United States,* 81 F. Supp. 921, 924-925, affirmed, 336 U.S. 933.

The Commission, therefore, by its finding in the present proceeding that:

> "Routes are available to and from points on the S.P.&S., via Spokane, in connection with the complainant (Milwaukee) and its eastern connections, but generally shippers would have to pay combination rates if such routes were used." *Chicago, M. St. P. & P. R. Co.* v. *Spokane, P. & S. Ry. Co.,* 300 I.C.C. 453, 457.

has thereby determined that through routes do exist notwithstanding, as in the *Virginian* and *Great Northern* cases, *supra,* higher combination rates are an obstacle to the use of such routes.

Finally, the Commission has recognized that a through bill of lading is, as to the carrier's recognizing it, conclusive evidence of the existence of a through route. *Through Routes and Through Rates,* 12 I.C.C. 163, cited by this Court in *Denver & R.G.W.R. Co.* v. *Union P.R. Co.,* 351 U.S. 321, 327. The S.P.&S. System and the Milwaukee currently exchange loaded cars at Spokane on through billing in excess of 500 cars a year. The record before the Commission indicates that the commodities include:

Laundry equipment
Candy and confectionery

Food products in cans and packages
Starch
Manufactures and miscellaneous
Chemicals
Soap and cleaning and washing compounds
Furniture
Insecticides and fungicides
Livestock
Lumber and forest products
Petroleum and its products
Containers

The existence of joint rates heretofore described, the finding by the Commission that routes are available, even though at higher combination rates, and the actual movement of hundreds of carloads annually via Spokane prove the existence of arrangements for interchange at Spokane and the continuous movement of traffic via the Milwaukee's line between Spokane and Minneapolis-St. Paul.

4. If the refusal of the S.P.&S. System to join in through routes or joint rates with the Milwaukee constitutes a violation of sections 1(4), 3(1), or 3(4) as alleged by the Milwaukee, it is the Commission's duty under section 15(1) to establish such routes or rates. Section 15(4) by its own terms, does not restrict the Commission in discharging its duty if the refusal of the S.P.&S. System to enter into joint rates with the Milwaukee is a violation of section 3 of the Interstate Commerce Act. Section 3(1) prevents undue and unreasonable preference and prejudice between persons, companies, localities, gateways, regions, etc. The Commission in its report, page 498, was of the opinion that it must deny relief to a prejudiced shipper or locality unless served by the same carrier as the preferred shipper or locality, or unless both are served

by carriers acting in concert or collusion. This is contrary to the holding of this Court in *Texas & P.R. Co.* v. *United States,* 289 U.S. 627, 648, 649:

> "So, too, a carrier may be responsible for preference or prejudice where it participates in one of several through routes between points of origin and the prejudiced destinations, although its own line may reach only one or neither of the latter, *St. Louis S.W. R. Co.* v. *United States,* 245 U.S. 136, 62 L.ed. 199, 38 S.Ct. 49, for the discrimination is brought about by the disparity of rates, and the order requiring its abatement necessarily runs against all the carriers parties to them."

The Commission moreover could not find that any shipper or locality was disadvantaged to the extent necessary to support a finding under section 3(1) of unlawfulness. Supporting the request for joint rates between the S.P.&S. System and the Milwaukee were mill operators who are served only by the Milwaukee and who are unable in many instances to obtain lumber from S.P.& S. origins or to reach sales markets available to competitors located on the Northern Lines. Also, among the supporting witnesses were grazers of sheep along the Milwaukee who are penalized a minimum of $40 per car if they stop sheep originating at S.P.&S. points for grazing in the extensive areas along the Milwaukee Road east of Spokane. To bar Milwaukee shippers by rate penalties from sources of supply, markets for sales, and transit privileges, which are available without penalty to shippers via the Northern Lines, inflicts no trivial disadvantage and fully supports a section 3(1) finding of unlawfulness.

The only possible basis for the finding that the S.P.&S. System has not unlawfully discriminated against the Milwaukee in favor of the Northern Lines in violation of

section 3(4) would be that each Northern Line must be treated as a single line with the S.P.&S. System. In the absence of common management or control, there is no reason herein to consider two separate corporations as one, and the S.P.&S. System is discriminating against the Milwaukee in favor of its other connections in violation of section 3(4).

For the various reasons already mentioned, *i.e.* (1) lack of common management or control, (2) existence of through routes, and (3) section 3 violations, the short haul protection of section 15(4) is not available to the S.P.&S. System. Its refusal, therefore, to establish joint rates, or joint rates and through routes, with the Milwaukee is a violation of section 1(4).

It is thus apparent that the finding by the Commission of no violation of sections 1(4), 3(1) and 3(4) is without support in law or evidence.

5. In addition to its duties under section 15(1), the Commission is directed by Congress under section 15(3), whenever deemed by the Commission to be necessary or desirable in the public interest, to establish through routes and joint rates. A violation of the Act is not a prerequisite to Commission action under section 15(3).

If section 15(4) applies, the Commission must also find that the proposed through routes are needed in order to provide adequate and more efficient or more economic transportation.

In view of the substantial questions concerning control, through routes, and section 3 violations, the parties are entitled to a finding under section 15(3) whether the joint rates, or joint rates and through routes are necessary or desirable in the public interest independently of

a finding under section 15(4) whether through routes are needed to provide adequate and more efficient or more economic transportation, instead of the Commission's combined section 15(3) and 15(4) finding:

> "That it is not shown to be necessary or desirable in the public interest, in order to provide adequate and more efficient or more economical transportation, to require the establishment of through routes and joint rates in connection with the S.P.&S. system and the Milwaukee and its connections via Spokane the same as apply in connection with the S.P.&S. system and the northern lines and their connections via Spokane." 300 I.C.C. 453, 498.

The Commission's examiner was of the opinion that the evidence supported the establishment of through routes and joint rates on lumber and forest products, fresh fruits and vegetables, and livestock from points on the S.P.&S. System to destinations east of Spokane, and on furniture, agricultural implements, grain, iron and steel grain bins, and hogs, from points east of Spokane to destinations on the S.P.&S. System. In its final report, the Commission adopted practically verbatim, the examiner's statement of evidence upon which the examiner recommended that the Commission require the S.P.&S. to establish joint rates and through routes on the commodities named, but the Commission held such evidence was insufficient to require the establishment of through routes and joint rates.

In the evidence cited by both the examiner and the Commission was testimony of a need to stop in transit at local points on the Milwaukee between Spokane and Minneapolis-St. Paul for completion of loading, partial unloading, or storage, or to reconsign therefrom shipments originating or terminating on the S.P.&S. System. The Northern Lines, of course, are unable to supply that service

at such points. As stated by Justice Frankfurter, referring to similar shipments in his dissent in *Denver & R.G.W. R. Co.* v. *Union P.R. Co.*, 351 U.S. 321, 342:

> "In both situations it is a fiction to speak of a single shipment on which the Union Pacific would be short-hauled should the proposed through route go into effect. The situation involves two separate shipments for which, under normal railroad practice, only the rate of a single continuous shipment over the whole route is charged. On neither of these shipments is Union Pacific being short-hauled because it is capable of performing neither. In this sense, Union Pacific service is of course not 'adequate'; it is non-existent."

CONCLUSION.

The questions presented by this appeal are so substantial and of such great importance to the carriers, shippers, and communities involved as to merit plenary consideration with briefs and oral arguments for their resolution. Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A.

OPINION APPEALED FROM
[*page 81 of 182 F. Supp.]

*CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, Plaintiff,

Ezra Taft Benson, Secretary of Agriculture of the United States, National Livestock Producers Association, American National Cattlemen's Association, National Wool Growers Association, and Chicago Producers Commission Association, Intervening Plaintiffs,

v.

United States of America, Interstate Commerce Commission, Spokane, Portland and Seattle Railway Company, Great Northern Railway Company, and Northern Pacific Railway Company, Defendants,

Oregon Electric Railway Company, Oregon Trunk Railway, Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island and Pacific Railroad Company, and The Minneapolis & St. Louis Railway Company, Intervening Defendants.

Civ. A. No. 58-C-77.
United States District Court
E. D. Wisconsin.

March 25, 1960.

Action by transcontinental railroad to set aside and

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enjoin order of the Interstate Commerce Commission denying relief sought by railroad which had asked Commission to require local railroad to establish certain

through and joint rates in connection with transcontinental railroad. The District Court, Grubb, J., held that under statute withholding from Interstate Commerce Commission power to establish through routes and joint rates where railroad without its consent may be required to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction or under a common management or control therewith, the joint control of railroad in question by two other railroads, neither of which could individually control railroad, fell within the long haul protection of statute.

Injunction denied and complaint dismissed.

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*Before HASTINGS, *Chief Judge*, U. S. Court of Appeals, and TEHAN, *Chief Judge*, and GRUBB, *District Judge*.

GRUBB, *District Judge*. This action was brought by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company against the United States of America, the Interstate Commerce Commission, the Spokane, Portland and Seattle Railway Company, the Great Northern Railway Company, and the Northern Pacific Railway Company, under 28 United States Code, Sections 1336, 1398, 2284, and 2321-2325, inclusive, to set aside and enjoin an order of the Interstate Commerce Commission dated May 10, 1957.

On February 16, 1954, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as the "Milwaukee") filed with the Interstate Commerce Commission a complaint which, as amended, alleged that the refusal of the Spokane, Portland and Seattle Railway Company (hereinafter referred to as the "S. P. & S.") to establish through routes and joint through rates in connection with the complainant applicable to freight traffic of whatsoever nature moving between points on the S. P. & S. on one hand and points throughout the United States on the other via the City of Spokane resulted in violations of Sections 1(4), 3(1), and 3(4) of the Interstate Commerce Act.

The complaint then asked the Commission to require the S. P. & S. to establish through routes and joint rates via Spokane in connection with the complainant applicable to all freight traffic where such do not already exist via the aforementioned gateway on the same basis as may now or hereafter be available from and to S. P. & S. points over routes through the Spokane gateway in connection with the Great Northern Railway Company and the Northern Pacific Railway Company (hereinafter referred to collectively as the "Northern Lines" and separately as the "Great Northern" and the "Northern Pacific").

The Commission rejected the claims of the complainant and denied all of the relief sought. At page 498 of its report (300 I.C.C. 453), the Commission found:

"1. That the S. P. & S. system is operated under a common management and control with, and that its traffic policy is controlled by, the Great Northern and the Northern Pacific, and therefore must be considered as a part of the latter carrier systems.

"2. That the failure and refusal of the S. P. & S. to join in the establishment of through routes and joint rates via Spokane in connection with the Milwaukee and its connections, the same as apply via Spokane in connection with the northern lines and their connections, does not result in discrimination against the Milwaukee, nor in undue preference or prejudice between shippers or localities.

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*"3. That it is not shown to be necessary or desirable in the public interest, in order to provide adequate and more efficient or more economical transportation, to require the establishment of through routes and joint rates in connection with the S. P. & S. system and the Milwaukee and its connections via Spokane the same as apply in connection with the S. P. & S. system and the northern lines and their connections via Spokane."

The Commission further found that with certain limited exceptions, there are no existing through routes as that term is used in the Interstate Commerce Act in connection with the S. P. & S. and the Milwaukee via Spokane.

The S. P. & S. is a common carrier by railroad incorporated under the laws of the State of Washington. It owns all of the capital stock of the Oregon Electric Railway Company and all of the capital stock, except qualifying shares, of the Oregon Trunk Railway. Collectively the three railroads are known as the Spokane, Portland and Seattle Railway System (hereinafter refetred to as the "S. P. & S. System").

The S. P. & S. System lines lie entirely within the States of Oregon and Washington, and the eastern terminus of its tracks is Spokane, Washington. At that point physical track connections with the Milwaukee, Great Northern, and Northern Pacific are available. The lines of the S. P. & S. and its subsidiaries approximate 950 miles in length. The Northern Lines each own 50 per cent of the capital stock and outstanding bonds of the S. P. & S.

The Milwaukee is a common carrier by railroad incorporated under the laws of the State of Wisconsin. It operates approximately 10,600 miles of railroad in the States of Washington, Idaho, Montana, North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, Michigan, Wisconsin, Illinois, and Indiana. Generally speaking it might be said that its lines serve the Pacific Northwest on the one hand and the Middle West on the other. Although it does serve Spokane, the main line of its Pacific coast extension bypasses that point.

The Northern Pacific and the Great Northern are both common carriers by railroad and are incorporated under the laws of the States of Wisconsin and Minnesota, respectively. Each operates through the northern tier of States between the North Pacific coast on the west and Minneapolis and St. Paul and the head of the Great Lakes on the east. Spokane is on the main transcontinental routes of each of the Northern Lines.

The parties have agreed that the principal issues in this case are as follows:

1. Did the Commission err in finding and concluding that the S. P. & S. System is operated in conjunction and under a common management and control with the Northern Lines within the meaning of Section 15(4) of the Interstate Commerce Act?

2. Did the Commission err in finding and concluding that with certain exceptions there are no through routes between points on the S. P. & S. System on the one hand and, on the other, points throughout the United States generally east of Spokane and Canada in connection with the Milwaukee via Spokane?

3. Did the Commission err in finding and concluding that it is not necessary or desirable in the public interest in order to provide adequate and more efficient or more economic transportation to require the establishment of through routes and joint rates with reference to certain commodities in connection with the S. P. & S. System and the Milwaukee and its connections via Spokane the same as apply in connection with the S. P. & S. System and the Northern Lines and their connections via Spokane?

4. Did the Commission err in finding and concluding that the refusal of the S. P. & S. System to participate in joint rates with the Milwaukee and its connections similar to those in effect with the Northern Lines and their connections was not a violation of Sections 1(4), 3(1), or 3(4) of the Act?

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*In respect to the first issue, the power of the Commission to establish through routes and joint rates under Section 15(3) of the Interstate Commerce Act is limited by Section 15(4). The pertinent portions of these statutes read as follows:

Section 15(3): "The Commission may, and it shall whenever deemed by it to be necessary or desirable

in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *"

Section 15(4): "In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, *to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route*, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: * * *." (Emphasis added.)

It is the contention of the plaintiff that as the extreme eastern terminus of the lines of the S. P. & S. System is Spokane, the establishment of the through routes and joint through rates sought via that point would not deprive the S. P. & S. of any portion of its line haul, and that, therefore, the provisions of Section 15(4) are not applicable. On the other hand, the S. P. & S. and the Northern Lines contend that the former railroad is operated in conjunction with and under the common management and

control of the latter railways and that if the plaintiff prevails, the Northern Lines, in conjunction with the S. P. & S., would be "short-hauled" in contravention of the Act.

The first matter considered by the Commission in regard to the issue of common management and control was the factual relationship between the S. P. & S. and the Northern Lines. Without repeating the detailed findings of fact of the Commission (see pages 463-467 of 300 I.C.C. 453), it can be fairly stated that while neither the Northern Pacific nor the Great Northern can individually control the S. P. & S., the Northern Lines certainly can and do collectively (or jointly) control their subsidiary including its traffic policy.

The question presented then is whether joint control by two railroads over a third railroad falls within the long haul protection of Section 15(4). In this latter respect there is no question but that the language of the statute is framed in the singular, and, therefore, such a situation does not fall within the precise wording of the Act.

The plaintiff contends that such joint or collective management and control is not sufficient to invoke the long haul protection of Section 15(4) for "control" as used in that statute must be construed as complete or dominating legal control. Such a construction would, of course, limit the long haul protection of Section 15(4) to situations where a single railroad owns at least a majority of the stock of a subsidiary railroad.

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In support of its contention the plaintiff points to the legislative history of the Interstate Commerce Act and specifically to the enactment of Section 1(3)(b) in 1940. This section reads as follows:

> "For the purposes of sections 5, 12(1), 20, 204(a)(7), 210, 220, 304(b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another

person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

The Congressional purpose in enacting this statute was to make applicable to specific sections of the Act the Supreme Court's interpretation in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, of the term "control" as used in Section 2 of the Communications Act. In H. Rep. 2832, 76th Cong., 3d Sess., the joint Senate-House Conference Committee made the following comments in regard to this amendment of the Act:

"This subsection inserts in paragraph (3) of section 1 of the Interstate Commerce Act a definition of 'control' which will apply in certain specified sections of the act where that term is used in referring to a relationship between any person or persons and another person or persons. Since the term 'person' is defined to include artificial as well as natural persons, the definition of control will cover relationships between corporations, companies, associations, etc.

"The definition of control was made to apply only in the specified sections because it was thought undesirable to make any change in the interpretation of present law in certain other provisions of the act, notably section 1(1)(a) and section 15(4). The application of this definition of control will in most cases be in connection with the use in the sections to which it applied of the phrase 'controlling, controlled by, or under common control with' a carrier. This phrase has been used because it has recently had the benefit of interpretation by the Supreme Court in the case of *Rochester Telephone Corporation* v. *United States*, • • •"

The plaintiff argues that since this broader definition of "control" was not applied to Section 15(4), Congress did not intend to extend the protection of Section 15(4) to a situation where two or more railroads jointly manage and control a third. The weakness of such a contention is (1) it is clear that Congress did not have such a situation in mind when it considered this legislation, and (2) Congress has expressly set out the reason it did not broaden the scope of the word "control" in Section 15(4).

As stated in the Committee report, Section 1(3)(b) was enacted to conform the definition of "control" as used in certain sections of the Interstate Commerce Act to the interpretation placed upon it in the *Rochester Telephone Corporation* decision. In that case the question considered was simply whether a single stockholder with substantial but not majority stock holdings could be said to be in control of a corporation either directly or indirectly. The situation in the present case where two railroads each own 50 per cent of the outstanding stock of a third railroad and obviously exercised joint control is not even analogous to the facts of the *Rochester Telephone Corporation* case.

In our opinion the significant fact in the enactment of Section 1(3)(b) is not the express exception of Section

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15(4)* from the broadened definition of "control" but the reason given therefor—that Congress thought it "undesirable to make any change in the interpretation" of Section 15(4). The interpretation so referred to resides in the decisions of the Interstate Commerce Commission prior to the year 1940 which clearly show that the Commission would interpret the phrase "under common management or control" to include a joint ownership situation such as we have in the instant case when such a case was presented to it.

In *Blackshear Mfg. Co.* v. *Atlantic Coast Line R. Co.*, 87 I.C.C. 654, a rate-making case not involving Section 15(4), the following statement is found:

> "It should be understood that where the term 'carriers under the same management and control' is used in this report, it refers to carriers generally controlled through ownership, lease, or otherwise to the extent of controlling traffic policy, even though separate corporate entity may be maintained."

In subsequent rate cases the Commission continued to use control of traffic policy as its criterion in judging whether railroads should be considered under the same management and control for rate-making purposes. *Humbard Construction Co.* v. *Southern Ry. Co.*, 161 I.C.C. 38; *Livestock To, From, and Between Points in the Southeast*, 91 I.C.C. 292; *Raleigh Freight Traffic Bureau* v. *A.C.L. R.R. Co.*, 107 I.C.C. 156; *Justice Co.* v. *Holton I-U Ry. Co.*, 153 I.C.C. 673; *Rates on Chert, Clay, Sand and Gravel Within Georgia*, 197 I.C.C. 215; and *Roth Blum Packing Co.* v. *Southern Pacific Co.*, 204 I.C.C. 93.

There are also a number of Interstate Commerce Commission decisions in which that body has applied the *Blackshear* definition of management and control to Section 15(4) cases where the long haul protection of that statute has been invoked and common management and control was an issue. *Alabama T. & N. R. Corp.* v. *Southern Ry. Co.*, 148 I.C.C. 708, and *Georgia & F. R.* v. *Atlantic Coast Line R. Co.*, 191 I.C.C. 489.

In addition to these cases involving Section 15(4), the *Blackshear* definition of management and control was also used in a case involving discrimination under Section 3(4) of the Act. *Seaboard Air Line Ry. Recs.* v. *Carolina & Northwestern Ry. Co.*, 204 I.C.C. 416. Although not a Section 15(4) case, the decision is nonetheless important for the Commission recognized that retention of the long haul by railroads under common management and control as defined in the *Blackshear* case was not a violation of Section 3(4). The plaintiff has conceded that there can be no violation of Section 3(4) if the defendant railroads are under common management or control as prescribed in Section 15(4).

In another line of Interstate Commerce Commission decisions, the Commission has held that for rate-making purposes one railroad can be jointly managed and controlled by two other independent railroads. *Russ Market Co.* v. *Northwestern Pacific R. Co.*, 171 I.C.C. 117; *Des Moines Union Railway Switching*, 231 I.C.C. 631; *Eriksen* v. *Ann Arbor R.R. Co.*, 102 I.C.C. 374; *Pacific Lumber Co.* v. *Northwestern Pacific R. Co.*, 51 I.C.C. 738; and *Roth Blum Packing Co.* v. *Southern Pacific Co.*, 204 I.C.C. 93.

In this respect it might also be noted that the Commission has commented in a number of decisions that the S. P. & S. for rate-making purposes must be considered as part of the Northern Lines rather than an independent railroad. *Portland Chamber of Commerce* v. *Oregon & Nav. Co.*, 19 I.C.C. 265; *City of Astoria* v. *S. P. & S.*, 38 I.C.C. 16; *Inland Empire Shippers League* v. *Director General*, 59 I.C.C. 321; *West Coast Lumbermen's Association* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 129 I.C.C. 363; *S. P. & S., Railway Company & Oregon Trunk*, 41 I.C.C. Valuation Reports 1; *Pillsbury-Astoria Flour Mills Co.* v. *Great Northern Railway Co.*, 198 I.C.C. 642; and *Helix Milling Co., Inc.* v. *Great Northern Ry. Co.*, 287 I.C.C. 77.

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*In the first case cited the Commission stated at page 283:

> "So far as these proceedings are concerned, we believe this road (S.P.&S.) must properly be considered a part of the Northern Pacific and Great Northern systems rather than as an independent line. It is used by the Great Northern and Northern Pacific in the transportation of all business between coast and interior points which can be handled more cheaply over it than over the existing lines of the Great Northern or Northern Pacific."

The holdings in the above-cited Interstate Commerce Commission decisions can be summarized as follows:

1. Control of traffic policy is tantamount to management or control in *rate cases.*

2. Two competitive railroads can jointly manage and control a third railroad by controlling traffic policy insofar as *rate cases* are concerned.

3. Control of traffic policy is also used as the definition of management or control in Section 15(4) cases.

Implicit in these holdings of the Interstate Commerce Commission are two concepts: (a) Control of traffic policy is decisive in questions of management and control, and (b) two independent railroads can jointly manage and control a third. In addition, these two concepts have been applied on two levels: (1) Rate-making cases, and (2) cases involving Section 15(4). So far the Commission has applied both concepts on the rate case level but has applied only the traffic policy control concept on the Section 15(4) level. This application of the traffic policy control concept to the Section 15(4) level has been tacitly approved by Congress because of its statement in 1940 to the effect that it did not want to interfere with the prevailing interpretation of Section 15(4).

The only remaining question then is whether Congress would also approve of the application of the second concept, *i.e.* joint management and control by two competitive railroads to the Section 15(4) level. Because of considerations which will be set out in detail below, this court is of the opinion that Congress did intend to cover the present situation when it used the words "under common management or control" in Section 15(4) of the Interstate Commerce Act.

It will be noticed that the commission has used the same test in regard to management and control, *i.e.* control of traffic policy in every situation it has met so far. In other words, the Commission has followed a definite pattern and it is only reasonable to assume that Congress would expect the Commission to continue to follow this pattern in the future.

The logic of such an assumption is buttressed by the fact that both of the concepts mentioned above have been applied on the rate case level. If at this point one of these concepts is used on the Section 15(4) level and the other rejected, the consistency of the overall plan of railroad regulation would be disturbed. For example, since joint management and control is recognized on the rate case level, the subsidiaries involved in such a situation would not be allowed weak line arbitraries. Arbitraries are differentially higher rates which are allowed to so-called short or weak line railroads in addition to rate scales prescribed for general application. In *Rate Structure Investigation*, Part 13, Salt, 197 I.C.C. 115, 181-182, the Commission stated:

> "It has been the almost uniform practice to give all of these lines, other than those that are under common control or management with some standard carrier, arbitraries in addition to the scales prescribed for general application, and the same course is here warranted."

In addition, the Commission has usually prescribed two distance scales. One is a single line rate scale for application over a single railroad or over two or more lines under the same management and control. The other is a higher joint line scale which applies when the lines

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embraced in the routes were not under common management and control. In *Livestock To, From, and Between Points in the Southeast*, 101 I.C.C. 105, 107, the Commission stated:

> "* * * we have almost invariably required lines under a common management and control to apply the single-line rates. These decisions were based on the fact that such management and control result in certain benefits in operation, and on our opinion that the single-line rates would be reasonable for application over such lines."

If the long haul of railroads in a joint management and control situation is not protected by Section 15(4), the very benefits which the Commission regards as preventing them from charging higher joint-line scales or arbitraries, *i.e.* the economies of joint operation, will be taken from them. Clearly, such a result would be inconsistent.

The obvious purpose of Section 15(4) is to allow a carrier to protect its long haul not only over its own route but over that of a closely associated affiliate. The decision of the Commission in this case is consistent with this purpose, and there has been no sound reason, economic or otherwise, advanced why two joint owners are not any less in need of long haul protection than a single railroad which controls a subsidiary.

Section 15(4) contains a provision which nullifies the long haul protection normally afforded by the statute when the Commission finds that through routes are needed in order to provide adequate and more efficient or more economical transportation. Thus, although no real reason has been put forward why joint ownership of a subsidiary plus long haul protection are inherently wrong, the Commission is always in a position by virtue of this exception to see that no one is prejudiced by such an arrangement.

Another point to be considered is the relationship of Section 3(4) of the Act to Section 15(4). The former statute deals with discrimination between railroads, and the plaintiff has conceded that if the S. P. & S. is under the common management or control of the Northern Lines within the meaning of Section 15(4), then the refusal of the S. P. & S. to accord the Milwaukee equal treatment does not constitute a violation of Section 3(4). See *Atlantic Coast Line R. Co.* v. *Cape Fear Rys., Inc.*, 218 I.C.C. 152; *Western Pac. R. Co.* v. *Northwestern Pac. R. Co.*, 191 I.C.C. 127; and *Seaboard Air Line Ry. Recs.* v. *Carolina & Northwestern Ry. Co.*, 204 I.C.C. 416.

Viewed in the light of this relationship between the two sections, the decision in *Louisville & Nash. R.R. Co.*

v. *United States*, 242 U.S. 60, strongly supports the views of the Commission in the case at bar. In that decision which involved the use of switching facilities, the court was considering a question of discrimination under the forerunner of Section 3(4). In its opinion the court stated that if either of the joint owners of these switching facilities was the sole owner, discrimination would be impossible because the section as then constituted stated that the Act "shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." The court then ruled that "* * * what is true of one owner would be equally true of two joint owners, * * *." It should be noticed that this statement was made even though the literal words of the section are singular in meaning.

In the instant case there is also a situation presented where if there were only one owner there could be no possible discrimination. In the case at bar this is so because of the presence of Section 15(4). In the *Louisville* case it resulted from the wording of the forerunner of Section 3(4). In other words, although the reasons for the impos-

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sibility of discrimination in a single owner situation are different, the result is still the same.

Thus, if it could be said that the *Louisville* decision is controlling on the question of discrimination in the present case, which issue this court does not decide, however, it would seem to follow that the S. P. & S. is under the common management and control of the Northern Lines within the meaning of Section 15(4) because of the relationship between that statute and Section 3(4). It is obvious that these sections must be read together for any inconsistency between the two would be untenable.

The plaintiff in this action has cited four Interstate Commerce Commission cases which it claims refutes the possibility of joint management and control by multiple

owners. These are: *Absorption of Switching Charges of Alton & S. R.R.*, 157 I.C.C. 129; *Manufacturers Ry. Co.* v. *Ahnapee & W. Ry. Co.*, 172 I.C.C. 554; *Justice Co.* v. *Holton I-U Ry. Co.*, 153 I.C.C. 673; and *Oklahoma Portland Cement Co.* v. *Kansas City S. Ry. Co.*, 188 I.C.C. 464.

The first two cases, due to their very short treatment of the issue of common management and control and because of the very large number of participants, are not persuasive on this issue. The latter decisions, on the other hand, are of little or no value for the fact situations are radically different from that of the case at bar.

Based on the foregoing authority, this court is of the opinion and now holds that the Commission was correct in concluding that the S. P. & S. System is operated in conjunction and under a common management and control with the Northern Lines within the meaning of Section 15(4) of the Interstate Commerce Act.

In respect to the issues numbered 2, 3, and 4, as set out previously in this opinion, the court is of the opinion after a careful review of the record and now holds that the findings of the Commission as to these issues are supported by substantial evidence and, thus, should not be disturbed.

Injunction denied and plaintiff's complaint dismissed.

APPENDIX B.

STATUTES INVOLVED.

Section 1(3)(b) of the Interstate Commerce Act, 49 U.S.C., Section 1(3)(b):

> "For the purposes of sections 5, 12(1), 20, 204 (a)(7), 210, 220, 304(b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

Section 1(4) of the Interstate Commerce Act, 49 U.S.C., Section 1(4):

> "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto;

and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3(1) of the Interstate Commerce Act, 49 U.S.C., Section 3(1):

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 3(4) of the Interstate Commerce Act, 49 U.S.C., Section 3(4):

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that it is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 13(1) of the Interstate Commerce Act, 49 U.S.C., Section 13(1):

> "That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

Section 15(1) of the Interstate Commerce Act, 49 U.S.C., Section 15(1):

> "That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or car-

riers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3) of the Interstate Commerce Act, 49 U.S.C. Section 15(3):

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to

part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto, or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

Section 15(4) of the Interstate Commerce Act, 49 U.S.C., Section 15(4):

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic,

transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."